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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP., *Petitioners*

v.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sid Harvey, Inc. and Sid Harvey Brooklyn Corp. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (Appendix A, *infra,* pp. 1a-27a) are

reported at 189 N.L.R.B. No. 93. The opinion of the court of appeals (Appendix B, *infra,* pp. 28a-40a) is reported at 460 F. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1972 (Appendix C, *infra,* p. 41a). By order dated August 4, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the absence of common active control over labor management policies, the fact that commonly owned companies are functionally integrated warrants a finding that they constitute a "single employer" for purposes of Section 8(b)(4) of the National Labor Relations Act?

STATUTE INVOLVED

The pertinent provisions of Section 8(b)(4) of the National Labor Relations Act are set forth in Appendix D, *infra,* p. 42a.

STATEMENT

Union Activities. In January 1970, a majority of the approximately 230 employees of Sid Harvey, Inc. rejected Local 810 of the International Brotherhood of Teamsters (the "Union") in a representation election conducted by the NLRB. Less than one month later, the Union commenced organizational activity of the 12 to 14 employees of Sid Harvey Supply Company ("Supply Company"). During the course of

this activity, a dispute arose concerning the discharge of a Supply Company supervisor. For the ostensible purpose of protesting this discharge, the Union not only confronted the management of Supply Company, but also picketed the separate facilities of Sid Harvey, Inc. and three associated sales companies.[1]

The Business of the Companies. Sid Harvey, Inc., located in Valley Stream, New York, is a manufacturer of rebuilt replacement parts for automatic heating systems. Many of its 230 employees are skilled workers.

Supply Company, located in Garden City, New York, receives and warehouses products manufactured by Sid Harvey, Inc. and by other manufacturers. Its inventory, more than two-thirds of which is purchased from manufacturers other than Sid Harvey, Inc., is sold to the Sid Harvey sales corporations. Supply Company's 12 to 14 employees all are unskilled workers.

There are 20 Sid Harvey sales corporations independently operating in 20 states and the District of Columbia. Each company offers a line of Sid Harvey, Inc. rebuilt parts, but approximately 65 percent of each company's sales consists of products manufactured by companies other than Sid Harvey, Inc.

Ownership and Control of the Companies. Through stock ownership, Stephen R. Harvey has voting control of Sid Harvey, Inc., Supply Company, and most of the sales corporations.[2] His voting control, how-

---

[1] In a separate proceeding, the Board dismissed the charge brought against Supply Company that the discharge constituted an unfair labor practice. *Sid Harvey Supply Co.*, NLRB Case No. 29-CA-1934.

[2] One of the sales corporations not under the voting control of Stephen Harvey was subjected to the picketing that is here in dispute.

ever, has not been utilized in such a way as to impose common management on the corporations. Sid Harvey, Inc. and Supply Company, as well as each of the sales companies, are separately managed and are actively and independently controlled by their respective chief executives. Stephen Harvey is president only of Sid Harvey, Inc. Each corporate president hires and fires employees; each grants raises on his own; and each is in charge of, and actually conducts, the day-to-day management of his corporation's business, including its relations with suppliers, customers, and its own personnel. In short, labor policy and general operational policies are developed and administered by the officials of each company.

Proceedings Below. Petitioners filed an unfair labor practice charge alleging that the Union violated Section 8(b)(4) of the National Labor Relations Act (Appendix D, *infra*, p. 42a) by secondary picketing at the premises of Sid Harvey, Inc. and the three sales companies in furtherance of the primary dispute with Supply Company. Upon application by the Board, the district court issued a temporary injunction restraining further secondary picketing pending final adjudication by the Board. *Kaynard* v. *Local 810*, 74 LRRM 2789 (E.D.N.Y.).

After extensive hearings, the Board concluded that, despite the substantial business transacted among the companies, there was not the "degree of integration of management and day-to-day operations" that rendered the separate companies a "single employer" for purposes of Section 8(b)(4) of the Act. Accordingly, holding that the Union's picketing constituted unlawful secondary activity, the Board sought enforcement in the Second Circuit of an order precluding the Union

from extending its picketing activities beyond the primary employer, Supply Company.[3] (Appendix A, *infra*, pp. 1a-27a.)

The Second Circuit denied the petition for enforcement and vacated the order of the Board. It accepted the finding of the Board that there was in fact no common control over the labor management policies of the separate corporations, but held nevertheless that these corporations constituted a "single employer." In the court's view, the Board's reliance on the absence of common active management represented a mechanical test that overlooked the essential issue of "neutrality." The court went on to explain that the determination whether an employer is "neutral" involves "a common sense evaluation of the relationship between the two employers who are being picketed." Applying this standard, the court concluded that, in light of the highly integrated functions performed by the companies and their interrelationship through stock ownership, the picketed employers cannot be considered neutral. (Appendix B, *infra*, pp. 28a-40a.)

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the interpretation five other courts of appeals have given the secondary boycott provision of Section 8(b)(4) of the National Labor Relations Act. See *J. G. Roy & Sons Co.* v. *N.L.R.B.*, 251 F. 2d 771 (C.A. 1); *Bachman Machine Company* v. *N.L.R.B.*, 266 F. 2d 599 (C.A. 8); *Sheet Metal Workers Local 223* v. *Atlas Sheet Metal Co.*, 384 F. 2d 101 (C.A. 5); *Television & Radio Artists* v.

[3] The Second Circuit granted leave to petitioners to intervene in this proceeding, to file briefs, and to participate in oral argument.

N.L.R.B., 80 LRRM 2001 (C.A.D.C.); *Los Angeles Newspaper Guild* v. *N.L.R.B.*, 443 F. 2d 1173 (C.A. 9), certiorari denied, 404 U.S. 1018. In each of these cases, it was found that separate companies, which were commonly owned, or separate divisions of the same company, were not commonly managed. In each, it was held that, in the absence of common management, the separate companies or divisions were not to be considered a "single employer" for purposes of the secondary boycott provision. Here, the Second Circuit agreed with the Board that the various companies involved were separately managed, and had distinct labor management policies. Yet, it departed from the uniform course of decision in other circuits by concluding that the various companies constituted a single employer.

To support its holding, the Second Circuit relied on the fact (Appendix B, *infra*, p. 30a) that the various Sid Harvey companies performed complementary or vertically integrated functions, and characterized these functions as constituting a "straight line operation." It also pointed out (Appendix B, *infra*, p. 36a) that other courts have mentioned the degree of economic interdependence and the integration of business operations as factors to be considered in applying the "single employer" doctrine. But *Roy, Bachman* and *Atlas Sheet Metal* also involved the performance of complementary functions, albeit not to the extent involved here. And although there have been references in some opinions to economic interdependence and integration, no court of appeals has previously held in reliance on these factors that two commonly owned, but not commonly managed, companies should be considered one under Section 8(b)(4). On the contrary, it is appar-

ent from the opinions that the courts have not accorded these factors controlling significance, but have taken them into account only for the purpose of resolving the ultimate question whether there was common active control over labor management policies.

Thus, in the *Roy* case, the First Circuit saw the ultimate question as whether (251 F. 2d at 773) potential control through stock ownership had been exercised to achieve "actual common control over labor policies or any other phase of the operations * * *." In *Bachman,* it was whether (266 F. 2d at 601) the president of two commonly owned corporations had "actual control" over the labor policies of both. And, in *Atlas Sheet Metal,* it was whether (384 F. 2d at 105) there was "actual common control exemplified by domination of the secondary by the primary employer or an overlapping of management functions and not merely potential common control inherent in common ownership." (Footnote omitted.)

While neither the *Television and Radio Artists* case, nor the *Los Angeles Newspaper Guild* case involved vertically integrated operations—in each separate divisions of the same corporation performed the same or similar functions, and thus were horizontally integrated—the District of Columbia and Ninth Circuits held that the absence of common management between the divisions justified treating them as separate employers for purposes of Section 8(b)(4). They did so despite the obvious economic interdependence of divisions of the same corporation, despite the fact that the labor costs of one division necessarily would have a direct impact on the resources of the other, and despite the fact that the employees of each division performed the same or similar work, and thus had a great-

er community of interest than those in the instant case, who had different skills and performed distinct functions.

In sum, the cases upon which we rely, none of which were discussed by the court below, cannot be differentiated on their facts. Though cases in this area have a substantial factual element, the single critical fact for present purposes is that five courts of appeals have resolved the "single employer" issue by reference to the common management criterion, while the court below has rejected that standard. In doing so, it has decided this case differently from the way in which it would be decided elsewhere. Since the issue raised here is a continually recurring one—it potentially arises in every case in which commonly owned companies perform complementary functions—review by this Court is warranted to resolve the conflict in the circuits.

2. Common management provides the most logical standard for determining whether two companies should be viewed as a single employer under Section 8(b)(4). Where the labor policies of two companies emanate from the same individuals, the community of interest among the employees warrants an exception to the general rule that separate corporate entities are to be respected. The exception is made because the conditions of employment are in fact controlled by the same persons, and, in a very real sense, there is only a "single employer." On the other hand, in the absence of common active management of two separate companies, the essential community of interest among the employees is lacking because they are, by hypothesis, subject to different labor management policies. To permit secondary activity under these circumstances would seriously erode the protection that Sec-

tion: 8(b)(4) was intended to afford to both non-disputing companies and their employees.

This is vividly illustrated by the instant case where, shortly after the 230 employees of Sid Harvey, Inc. had rejected the Union as its bargaining representative, the same employees were again subjected to pressure by the same Union because of a dispute in a separately incorporated and managed company employing 12 to 14 persons. The Union also picketed three of the sales companies located in the New York area, thereby entangling those companies and their employees in a dispute in which their interests had never before been involved. One of these sales companies was not even subject to the voting control of Stephen Harvey. Furthermore, the Second Circuit's rationale apparently would leave the Union free to picket any of the associated sales companies located throughout twenty states and the District of Columbia, even though neither the managers of those companies nor the employees had any connection with, or knowledge of, the primary labor dispute.

3. Under the test adopted by the court below, the ultimate inquiry is whether, upon consideration of numerous factors, "common sense" would suggest that two companies are "neutral" in view of their ongoing relationships. However, if two companies are commonly owned, or if they are customers of one another, then, regardless of the number of factors considered, "common sense" is going to dictate that they are not "neutral." Their financial relationship, in and of itself, would seem sufficient to establish a lack of neutrality. Thus, literally applied, the test adopted by the Second Circuit inevitably will result in a substantial broadening of the "single employer" concept. Such an expansion of the concept cannot be squared

with the fundamental purpose of the proscription against secondary boycotts—to confine a labor dispute to the actual participants in the controversy. See *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675.

If, on the other hand, the Second Circuit's test is not to be applied literally, then that court has substituted for the clear and workable "common management" standard a "common sense" standard that is inherently vague and difficult of application. A standard with these deficiencies is particularly unsuitable in an area such as this one where predictability regarding the lawfulness of union activity is essential to protect both the parties to a labor dispute and other employers and employees from severe dislocation and injury.

Whether the decision below is read to expand the "single employer" doctrine, or simply as creating uncertainty, it promises to result in considerable labor strife and a proliferation of litigation. These consequences can be avoided only through review by this Court at this time.

4. Finally, the secondary boycott provision is at the forefront of a significant number of labor disputes. During fiscal 1970, some 2,200 unfair labor practice charges were filed under Section 8(b)(4). This amounted to more than 30 percent of the total of such charges filed against unions during that year. See 35th Annual Report of the National Labor Relations Board, p. 157.

Of course, not all Section 8(b)(4) cases involve commonly owned companies and the "single employer" doctrine. But, judging by the decided cases, it appears that the issue of the significance to be accorded

integrated operations arises frequently and in a variety of contexts in addition to the common ownership situation, and that the issue remains unsettled. See, *e.g., Carpet, Linoleum Layers Local 419* v. *N.L.R.B.*, 429 F.2d 747 (C.A.D.C.) (court remands to the Board for determination whether integrated relationship between separately owned and managed carpet retailer and installer precludes finding of neutrality); *Carpet, Linoleum Layers Local 419* v. *N.L.R.B.*, No. 71-1320 (C.A.D.C.), decided July 28, 1972 (court sustains Board's finding on remand that separately owned and managed carpet retailer and installer are neutral); *N.L.R.B.* v. *Local 810, Teamsters*, 299 F. 2d 636 (C.A. 2) (in this case, also involving the respondent Union, the picketing of a manufacturer in furtherance of a dispute with a separately owned and managed trucking company was held to violate Section 8(b)(4), despite the fact that the manufacturer provided the major portion of the trucker's business); *N.L.R.B.* v. *Dallas General Drivers Local 745*, 264 F.2d 642 (C.A. 5), certiorari denied, 361 U.S. 814 (distributor and retailer with some common stock ownership held neutral); *Truck Drivers & Helpers Local 728* v. *Empire State Express, Inc.*, 293 F.2d 414 (C.A. 5), certiorari denied, 368 U.S. 931 (separately owned local shipper and long distance mover found not neutral because of integrated functions and overlapping management). An opinion of this Court in the instant case would provide much-needed guidance throughout these closely related areas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 1972.

APPENDIX

APPENDIX A

TXD-749-70
[Issued 12/15/70] Long Island, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 29-CC-229

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

SID HARVEY, INC.

Case No. 29-CC-246

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

SID HARVEY BROOKLYN CO., INC.

Trial Examiner's Decision

STATEMENT OF THE PROCEEDING

ALBA B. MARTIN, Trial Examiner: This consolidated proceeding, with all parties represented by counsel, was heard before me in Brooklyn, New York from September 8 to 14, 1970.[1] This proceeding involves alleged violations by Respondent of Section 8(b)(4)(i) and (ii)(B) of the

[1] Sid Harvey, Inc. filed the charge in Case No. 29-CC-229 on March 12, 1970. Sid Harvey Brooklyn Co., Inc., filed the charge in Case No. 29-CC-246 on June 8, 1970.

National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act. After the hearing all parties filed helpful briefs, which have been duly considered. Upon the entire record and my observation of the witnesses I hereby make the following:

FINDINGS AND CONCLUSIONS

I. Jurisdiction

The Board's jurisdiction over this proceeding is not challenged. The five corporations directly involved have their principal offices and places of business in different cities or towns on Long Island, New York. These corporations are Sid Harvey, Inc., herein called Inc.; Sid Harvey Supply, Inc., herein called Supply; Sid Harvey Brooklyn Co., Inc., herein called Brooklyn; Sid Harvey Nassau, Inc., herein called Nassau; and Sid Harvey Suffolk, Inc., herein called Suffolk. During a recent year, a representative period, Inc. and Supply each had over a $50,000 direct outflow in interstate commerce, and each of the other three corporations had an indirect inflow in interstate commerce exceeding $50,000. Upon the record I find that each of the five corporations is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Respondent herein, sometimes called the Union and sometimes Local 810, is Local 810, Steel, Metals, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. It is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Introduction, and Principal Issues*

From March 10, 1970 until the issuance of a temporary injunction by a United States District Court on June 11,

1970,[2] Respondent engaged in picketing and other activity at the premises of Inc. in support of a labor dispute it had with Supply, the primary employer. Similar activity occurred at Brooklyn, in May and June, and at Nassau and Suffolk in early June. The picketing had begun at Supply on February 20 upon the discharge of a foreman on that date, and has continued ever since. Respondent had lost an election at Inc. on January 7, and since then has not claimed to represent the employees of Inc. Respondent had no pending labor dispute with Inc., Brooklyn, Nassau and Suffolk, when it picketed their premises.

The first issue is whether the object of the picketing at Inc., Brooklyn, Nassau and Suffolk was in violation of Section 8(b)(4)(i) and (ii) of the Act.

Assuming that it was, the next issue is whether these four corporations were entitled to the protection of the Act, as contended by the General Counsel; or allies of Supply, or doing struck work for Supply, and so not entitled to the protection of the Act, as contended by Respondent. On the "ally" issue the precise question is whether the corporations were under the actual control of Stephen Harvey, as distinguished from his potential control.

B. *The Object of the Picketing*

Respondent did not contest the testimony concerning the picketing incidents, but based its defense upon its allied and struck work theories. The following findings of fact are based upon virtually uncontested testimony.

Inc. From March 10 to June 10 Respondent picketed near Inc.'s loading dock where deliveries are received, carrying picket signs which indicated its dispute was with Supply, not Inc.[3] On the first day of picketing some 10

[2] All events herein occurred in 1970.

[3] The picket signs read, "Sid Harvey Supply, Inc., Unfair, Local 810, International Brotherhood of Teamsters"; and, "Sid Harvey Supply, Inc., Strike."

truckdrivers with goods bound for Inc. were spoken t
pickets and then pulled away without making deliv
One picket said to one driver, "I'll risk arrest rather
have you get in this cab and make the delivery." On
day also one picket said to a truckdriver, "We're T
sters, you wouldn't cross a Teamster line would y
During the entire span of the picketing Inc.'s vice p
dent saw at least 30 trucks pull up to the picket lin
leave. Sometimes the pickets spoke to the drivers,
sometimes they just held up the picket signs and w
the trucks on. None of the trucks turned away ca
goods consigned to or belonging to Supply.

Brooklyn's three stores in three different cities
picketed in May and June by pickets bearing signs sh
the dispute was with Supply and that the Union inv
was Local 810. At one store the pickets approache
drivers of two carriers who came up in two trucks
thereafter the drivers did not make any deliveries o
form any services. In front of another store picket
customers "... the store was on strike ...." and h
them a Local 810 leaflet stating in large letters a
"Don't Buy Sid Harvey Products." The pickets
customers not to go in. The pickets spoke to and t
away the driver of a service truck and also the d
of a "garbage" truck. The latter was taking the b
of "garbage" out when the pickets approached hi
told him "Sid Harvey's was on strike" and asked hi
to take the garbage. The driver put the two barr
garbage by the door, told the store manager he was
and left. Local 810 pickets appeared also in front
third store carrying picket signs reading "Sid H
Supply on Strike" and identifying Local 810 as the
involved. They spoke to drivers of several commo
riers' trucks, which arrived to make deliveries, and
then left without making any deliveries.

Nassau's Garden City store was picketed in late
and early June by Local 810 pickets, at least one of

was wearing a "strike" sign. A picket spoke to two customers from BP Oil Company, one of whom then left without going in. The pickets spoke to other customers as they drove up. On another day the pickets asked an oil burner serviceman from the same oil company not to go in, even for a cup of coffee, telling him that the servicemen of his company had agreed to respect the picket line and not go inside, because they were union men. The serviceman left without going in.

Suffolk's West Babylon store was visited by Local 810 pickets in early June. They parked a car across the street (a two-lane street) from the store and put up "strike" signs identifying Local 810 in the front and back windows of the car. They spoke to a truckdriver for a common carrier who was making a delivery at the store, who finished making the delivery. Then they spoke to him again as he was leaving. They passed out Local 810's "Don't Buy Sid Harvey Products" leaflets to customers as they approached the store. They gave one of the leaflets to a fuel burner serviceman who was entering to pick up a part.

Conclusions. Upon the above evidence and the entire record I conclude that Respondent's activities set forth above induced and encouraged employees of Inc., Brooklyn, Nassau and Suffolk and employees of persons doing business with them and other persons engaged in commerce, to refuse to use, manufacture, process, transport and otherwise handle and work on goods, articles, and materials, and to perform services for their respective employers; with an object to force and require Inc., Brooklyn, Nassau, Suffolk and other persons to cease using, selling, handling, transporting and otherwise dealing in the products of Supply, and to cease doing business with Supply, and with a further object to force or require persons doing business with Brooklyn, Nassau and Suffolk to cease using, selling, handling, transporting, and otherwise dealing in the products of Brooklyn, Nassau and Suffolk and to cease doing busi-

ness with Brooklyn, Nassau and Suffolk. These objects were in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

C. *Management and Operations of Inc., Supply, and the Sales Companies*

Although Inc., Brooklyn, Nassau and Suffolk, together with some 25 additional corporations (many of which have "Sid Harvey" in their titles) were closely associated in the business world as a kind of family of corporations, their operations were not integrated and one man's potential control over them has not been converted into actual control.

Stephen Harvey, the 38-year-old son of the late Sid Harvey, founder and inspirer of many of the corporations, is now chairman and president of Inc., the first or parent corporation, which rebuilds parts and devices used in heating systems for the heating and air conditioning industry. It sells no new parts. Inc.'s vice president, Herbert Lindtveit, runs the day-to-day operations of Inc. under Harvey.

William E. Dobie is president and operating head in day-to-day control of Supply, which buys and sells, warehouses and distributes products for the heating and air conditioning industry.

Nassau, Suffolk, and Brooklyn are three of some 20 associated "Sid Harvey" sales corporations which sell at wholesale new and rebuilt products for the heating and air conditioning industry. They sell only to the trade, such as oil companies, heating contractors and plumbers.

John Deyo is and has been president and operating head of Nassau for 15 years. He owed his appointment as president to Sid Harvey. Stephen Harvey has been president of Inc. only 11 years.

William Bernard is president and operating head of Suffolk and has been for 9½ years. He is the operating head of that corporation.

Bernard Schumacher has been president of Brooklyn for 5 months.

Each of these four corporations, Supply and the three sales companies, as well as Inc., keeps its own books and records, maintains its own payroll and pays on its own payroll. Each corporate president hires and fires employees, and grants raises, without checking with the corporation's board of directors or the chairman of the Board. Each corporate president is in charge of, and actually conducts, the day-to-day management of the corporation's business, including its relations with its sources of supplies, its customers, its management of its personnel, and its labor relations. Supply has its own line of credit and there was no proof that Inc. guaranteed Supply's credit.

President Deyo appointed Nassau's general manager without discussing the matter with anybody. He sets the hours of work of Nassau's employees, and determines their benefits, without consulting Nassau's board of directors; but about once a year he consults with Stephen Harvey about benefits.

Stephen Harvey, a very credible witness, testified that in no way is he involved in the day-to-day management of, or labor relations of, any of the companies other than Inc.

A union agent testified that after Supply had discharged a foreman, Stockton, on February 20, 1970, President Dobie told the agent that Dobie didn't have the power to put Stockton back to work, that there was nothing he could do, that his hands were tied. Dobie credibly denied this and said he told the union agent he was not going to change his previous decision, to make a snap decision on a complex legal matter, and that he would have to take into

consideration the counsel of his lawyers. I credit Dobie's testimony. Notable is the fact that Respondent did not ask Stephen Harvey if Dobie consulted him on this subject, although in its brief Respondent cited this incident as proof that "Mr. Stephen Harvey maintains and exercises control over the Sid Harvey Associated Companies."

Stephen Harvey owns all the voting stock of Inc., and is chairman of the board, president, and treasurer of that corporation. He owns voting control of Brooklyn and Nassau, but does not control Suffolk. Supply is owned by 14 of the sales companies including Brooklyn, Nassau and Suffolk. Harvey has voting control, directly or indirectly, of 9 of these 14 sales companies which in turn control 73 of the 100 outstanding shares of Supply's stock. Harvey is an officer and chairman of each of these 14 sales companies, and is treasurer and chairman of Supply. Harvey's secretary, Mrs. Lutz, aged about 60, is corporate secretary of Inc., Supply, and each of the 14 sales companies, but has no actual day-to-day duties in any of these corporations except Inc.

All of Inc's rebuilt products (it handles no new products) are warehoused and distributed by Supply, but Supply's existence is not dependent upon the business it does with Inc. Supply's average inventory consists of 65 percent new products belonging to Supply, 30 percent rebuilt products belonging to Inc., and 5 percent new products belonging to another corporation, wholly owned by Inc., called Sid Harvey Manufacturing Company, Inc., herein called Manufacturing. Supply's 65 percent new products are bought by Supply from outside sources, major manufacturers having no affiliation with Sid Harvey companies, such as "General Electric, ITT-General Controls Division, Honeywell, just to name a few of the major ones." President Dobie determines what new products to buy from what manufacturers, and what prices to sell them for, without consultation with anybody on Supply's board of directors.

Likewise the three sales companies are not dependent for their existence upon the business they do with Inc. or Supply, nor are they bound to hold to the percentages given below. Sixty percent of *Nassau's* sales are of new products. Forty percent are of rebuilt products. Of new products it gets 60 percent from Supply and 35 percent from outside manufacturers such as "Empire Ace," "Empire Chemical," "Sunray Burner Corporation," "General Electric" and "White-Rogers." Five percent of new products come from Manufacturing. Eighty percent of *Brooklyn's* sales are of new parts, 20 percent rebuilt. Of new products, 85 to 90 percent come from Supply and 15 to 10 percent come from original manufacturers such as "General Electric and Empire." About two-thirds of *Suffolk's* sales are new products, of which 70 percent come from Supply (including Manufacturing) and 30 percent from outside sources.

Inc. gets its "carcasses" which it rebuilds from the various sales companies around the country, including Nassau, Brooklyn and Suffolk. About 90 percent of these carcasses come to Inc. by common carrier and 10 percent through Supply.[4] Hence Inc. is not heavily dependent upon Supply as a source of carcasses.

Most of Inc.'s 300 employees work at a plant in Valley Stream, where the rebuilding of parts is performed. Inc's marketing group, which includes employees doing marketing, advertising, and printing work and the publication of its catalogues, is located about 8 miles away at Garden City in the same large warehouse building which houses Supply. The sections of the two corporations in that building are separated by partitions and lockable doors (which are open during working hours), and the employees of each company have separate entrances and separate restrooms. Each

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[4] I credit Lindtveit's testimony on this point as he is closer to the hour-by-hour day-to-day operations of Inc. than Harvey, whose testimony on this point Lindtveit corrected.

company pays rent directly to the landlord, which is a partnership. Supply's principal services rendered to Inc. consists of unloading Inc.'s trucks at Supply's dock, warehousing the goods, and later shipping them to Inc.'s customers by various methods. For this service and the necessary record keeping incident to it Supply bills Inc., and Inc. pays Supply a percentage of the dollar volume of rebuilt products shipped for Inc. Purchasers of such rebuilt products are bill directly by Inc. and make payment to Inc.

Supply performs certain minor functions of convenience for the Inc. employees in the same building with it. The Inc. unit is on Supply's telephone switchboard and Inc. pays a percentage of Supply's telephone bill. Inc. and Supply have different mailing addresses on different streets in Garden City, but sometimes Inc. mail is delivered by mistake at Supply's address. It is neither opened nor processed by Supply employees but is picked up by an employee of Inc. An employee of Supply processes the Inc. unit's outgoing mail, keeps a record of the postage cost, and periodically Inc. pays this cost to Supply. In February 1969 some Inc. employees assisted in the taking of inventory at Supply; however, the manpower supplied by Inc. roughly corresponded to the portion of the inventory owned by Inc. On a volunteer basis a Supply employee spent one half hour a day doing janitorial, cleanup work in the space occupied by Inc.'s marketing group at Garden City. This, and several other circumstances where Supply employees performed services for Inc., were presumably covered by the overall service fee paid to Supply by Inc. The evidence of this sharing of some minor services did not prove Inc. and Supply were a single employer or had common management.

A single hospital and medical policy, a single group policy, and a single automobile liability policy, covers the employees of all the companies. Each company pay its pro rata share of the cost.

About once a year meetings are held of the presidents and some other top executives of the associated companies, at which common problems, such as pricing, safety, packaging, new products, are discussed. Although at the meeting in May 1970, as might be expected the strike situation at Supply was discussed, there was no proof that overall policies resulted from these meetings, particularly no overall labor policy or personnel policy.

The record showed a number of instances where individuals have left one associated company and gone to work for another, usually at a better job. Respondent sought but failed to show common management by referring to these as "transfers" from one corporation to another, presumably arranged by management. In one case a man came to Inc. from the Pennsylvania Company, stayed 3 weeks and then moved to what he thought was a better job at the associated Ohio company. Inc.'s vice president, who would have known if the transfer had been arranged by management, learned the man was leaving after he had already gotten a job in Ohio.

In 1966 a Supply employee helped out Supply's counterpart in the midwest called Central Supply for about 3 weeks. After his return to Supply, somebody from Central Supply came to New York and asked him to go out to Central Supply permanently. After discussing the matter with his wife the employee decided not to go. Thereafter Stephen Harvey and the then president of Supply went out to the employee's home, with the permission of the employee, and explained to the wife how advantageous it would be to the employee if he went to Central Supply. The wife decided in the negative, the employee continued working at Supply. This incident showed Harvey did not move employees from corporation to corporation at will as Respondent would like to have proved. The employee was later promoted to foreman at Supply, which shows he was not penalized for refusing to move to Central Supply.

Although Respondent showed a number of working conditions in common among the employees of Inc. and Supply,[5] there were also many working conditions that were different between these two groups. If Inc. and Supply had a common management and if their operations were integrated, no reason appeared why the working conditions of both groups of employees would not have been the same. The two groups had different rules for qualification for overtime, different sick pay and disability benefits, and other benefits. Supply has no pension plan; Inc. does. Inc. has a cash attendance award. Supply does not. Inc. has a savings plan for employees; Supply does not. There are differences in the rules on "tardiness," smoking, making telephone calls, working on Election Day, to mention a few.

Inc. prints and distributes about monthly to the associated companies a publication in the nature of a "house organ" called "Renews." This is largely people-related, with articles and items mentioning many names and relating to the people in the various companies. It prints such news concerning ways of doing things as is submitted by the various companies. Each company pays for a share of the cost of publishing Renews.

The same firm of auditors serves all the companies. This firm prepared an office manual of standard operating procedures. The most the record established was that this manual was recommendatory and not mandatory; and there was no proof that it was widely followed by the companies or their officers.

The Garden City building occupied by Supply, Manufacturing, and the marketing group of Inc., is owned by Jane Associates, a partnership. The partners include but

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[5] These include the same system of rating jobs, the same work hours and two 10-minute rest periods, the same number of holidays, Christmas bonuses based upon length of service, the same profit-sharing program.

are not limited to corporate officers and families of the associated companies. Stephen Harvey has an interest in the partnership but not a majority interest.

The properties Inc. rents in Valley Stream for its main office and plant are owned by Wright Associates, a man named Clark, and the Long Island Railroad. Stephen Harvey has an interest but not a controlling interest in Wright Associates, and has nothing to do with the other two.

The land and buildings housing the various other associated companies are owned by other partnerships of which the partners are officers, families, and business friends of the various companies. Stephen Harvey does not have more than a one-fifth interest in any of these partnerships.

Employees of any associated company who have worked 10 years with Inc. or an associated company are eligible to attend the occasional party of the "F.O.F."—which means "Faithful Old Folks." The cost was defrayed by the companies whose employees attended, each company paying for its men.

The entire record did not support Respondent's principal contention, that all the associated companies had a common, integrated management under the actual control of Stephen Harvey. The latter was on the witness stand for a long time. His presence and his testimony indicated that he is not a strong, take-over, big-boss type. He took over the presidency of Inc. at the age of 27, presumably at the retirement of his father, Sid Harvey, and became chairman of Inc. in 1968 upon the death of his uncle. It is clear from all the facts that when he received the stock in the various companies and became chairman of their boards of directors he also inherited numerous officers and leaders of these companies earlier selected or assented to by his father or uncle, some of them older men than he and older in the business. Harvey credibly testified that he has been responsible for the ousting of two presidents of companies

and no one else; and that "I have never or would not get down into anything lower than the chief man who runs the financial center."

Upon all the above facts and considerations and the entire record in the case considered as a whole I find and hold that despite the cooperation and mutual assistance among the various corporations directly involved herein, there is not that appreciable degree of integration of management and day-to-day operations between Supply, the primary employer, and the others, as to make them allies and deprive Inc., Brookyln, Nassau and Suffolk of the protection of Section 8(b)(4) of the Act. Compare *Drivers, Chauffeurs & Helpers Local No. 639 (Poole's Warehousing, Inc.)*, 158 NLRB 1281, and cases cited at 1285, 1286; *Baltimore News American Division, The Hearst Corporation*, 185 NLRB No. 26; *San Francisco Examiner Division of The Hearst Corporation*, 185 NLRB No. 25; *Courtney & Plummer, Inc.*, 175 NLRB No. 86.

D. *The Struck Work Issue*

Respondent contended, but failed prove, that Brooklyn, Nassau and Suffolk were not entitled to the protection of Section 8(b)(4) of the Act because they were performing "struck work" for Supply.

The work normally performed by Supply's approximately 12 striking employees prior to the strike consisted of checking in, counting, identifying and labeling incoming material; storing the material in designated spaces in the warehouse; filling outgoing orders by "picking" the ordered parts from where they are stored, assembling them, putting them in pallet boxes, banding and labeling the boxes. In addition one employee spent about half his time helping drivers of common carriers and other companies to unload incoming shipments and to load outgoing shipments. During the strike no employees of Inc., Brooklyn, Nassau and Suffolk performed any of this work. In the

Hershey case[6] the Board defined struck work as "work which but for the strike would have been performed by the striking employees."

Both before and during the strike, small shipments consigned to Supply were sometimes left by the common carrier at *Nassau* as a result of mistake or as a matter of convenience. Nassau's headquarters office is located a few hundred feet from Supply. Sometimes common carriers drivers would request that Nassau accept the shipment for Supply and Nassau would do so. They were usually no more than two-three packages about 2 feet square, and they would be unloaded either by the driver or a Nassau employee. Then either Nassau personnel took the goods to Supply or Supply would send someone over to pick them up. Nassau personnel never did any work in Supply's warehouse. No one at Supply ever asked Nassau to accept deliveries for it.

Both before and during the strike at Supply, Nassau occasionally ordered goods from Supply which the latter would cause to be shipped by the manufacturer directly to Nassau. During the strike this direct shipment method was used five or six times. The material was intended for Nassau and was in fact used by it. President Deyo credibly testified that one of these shipments came from Jefferson Electric; and that the bill of lading in evidence was in error in indicating that Supply was the consignee, since the material was order for consignment to Nassau.

I find nothing in the above facts which deprived striking employees of any work customarily performed by them prior to the strike; nor was there any arrangement between Supply and Nassau for the receipt of deliveries bound for Supply.[7]

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[6] 153 NLRB 1051.

[7] Cf. *Catalano Bros., Inc.*, 175 NLRB No. 74.

In July 1970, a month or more after Respondent had picketed *Brooklyn's* three stores with unlawful objectives as found above, Brooklyn received several shipments of parts consigned to Supply at two of its stores. Thereafter Brooklyn's president delivered the goods to Supply in Brooklyn's truck and unloaded the truck. In addition to occurring after the picketing had been temporarily enjoined, Brooklyn distributed none of these goods to other customers of Supply and so did not circumvent the work to be performed by Supply employees at Supply's warehouse. In any case these amounted to nothing more than isolated incidents. Cf. *Seymour Transfer, Inc.,* 176 NLRB No. 69.

Both before and during the strike, but more often during, *Suffolk* has received goods consigned to Supply; and Suffolk's truck, in the course of its regular daily trip to Supply, has delivered the goods to Supply. They were unloaded during the strike the same as before the strike by Suffolk's driver and a Supply employee. During the strike Suffolk ordered goods from Supply, which the latter caused to be shipped from the source directly to Suffolk. This had occurred prior to the strike, also, but less frequently. It occurred about six times during the strike. These facts do not show any substantial amount of work taken from unit employees; and at the most they amounted to isolated incidents, in view of Supply's large volume of business and the fact that of all the unit work, the dock work occupied only one employee about one-half time. Cf. *Seymour Transfer, Inc., supra.*

Conclusions: Upon the above facts and considerations and the entire record in the case considered as a whole I find and hold that Brooklyn, Nassau and Suffolk were not doing "struck work" for Supply such as to make them allies of Supply and/or such as to deprive them of the protection of Section 8(b)(4)(i) and (ii)(B) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in Section III, above, occurring in connection with the operations of the companies as set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce, among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Inc., Supply, Brooklyn, Nassau and Suffolk are each an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) and 8(b)(4) of the Act.

2. Respondent, Local 810, Steel, Metals, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing the premises of Inc., Brooklyn, Nassau and Suffolk with the objects found and set forth in Sections III, B above, Respondent has violated and is violating Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order [8]

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent, Local 810, Steel, Metals, Alloys & Hardware Fabricators and Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, representatives, successors, and agents, shall:

1. Cease and desist from engaging in, or inducing or encouraging any individual employed by Inc., Brooklyn, Nassau and Suffolk and any individual employed by persons doing business with Inc., Brooklyn, Nassau and Suffolk, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any service; and cease and desist from threatening, coercing, or restraining Inc., Brooklyn, Nassau and Suffolk, or any other person engaged in commerce or in an industry affecting commerce; where, in either case, an object thereof is to force or require persons to cease doing business with Inc., Brooklyn, Nassau or Suffolk.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places at its business offices, meeting halls, and all places where notices to members are

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[8] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

customarily posted, copies of the attached notice marked "Appendix."[9] Copies of said notice, to be furnished by the Regional Director for the Twenty-Ninth Region shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for the Twenty-Ninth Region, for posting by Sid Harvey Supply, Inc., if willing, at all places where notices to its respective employees are customarily posted.

(c) Notify said Regional Director, in writing, within 20 days from the date of this Decision, what steps the Respondent has taken to comply herewith.[10]

Dated at Washington, D.C., December 15, 1970.

/s/ ALBA B. MARTIN
Trial Examiner

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[9] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[10] In the event that this Recommended Order is adopted by the Board after exceptions have been filed, notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT engage in, or induce or encourage any individual employed by SID HARVEY COMPANY, INC., SID HARVEY BROOKLYN CO., INC., SID HARVEY NASSAU, INC., SID HARVEY SUFFOLK, INC., or any individual employed by persons doing business with any of them, or any other person engaged in commerce or in an industry affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services; or threaten, coerce, or restrain any of the above-named companies or any other person engaged in commerce or in an industry affecting commerce; where in either case an object thereof is to force or require persons to cease doing business with any of the above-named companies.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11201 (Tel. No. 212-596-3535).

[Dated 1/6/71] TXD-749-70

ERRATUM

In the Trial Examiner's Decision just issued in these cases, by inadvertence there was lack of conformity between the Conclusions as to objectives on page 4, the Recommended Order on page 12, and the Notice to Members. This lack of conformity is hereby corrected as follows:

Page 4, line 23, after the first word, "employers", substitute a comma for the semi-colon and insert, "and threatened, coerced, or restrained Inc., Brooklyn, Nassau and Suffolk and other persons,";

Page 12, line 17, delete the first word, "service", and the semi-colon following it, and substitute therefor "services for their respective employers,";

Page 12, lines 20 and 21, delete these lines beginning in the middle of line 20 with the words "persons to cease" and substitute therefor the following:

> "Inc., Brooklyn, Nassau, Suffolk and other persons to cease using, selling, handling, transporting, and otherwise dealing in the products of Supply, and to cease doing business with Supply, or where an object thereof is to force or require persons

doing business with Brooklyn, Nassau and Suffolk to cease using, selling, handling, transporting, and otherwise dealing in the products of Brooklyn, Nassau, and Suffolk and to cease doing business with Brooklyn, Nassau and Suffolk."

In the Notice to Members, in the sixth line from the bottom, after the word "services" delete the semi-colon and insert, "for their respective employers,";

Delete the last two lines of the Notice to Members beginning with the words "persons to cease" and substitute therefor the following:

"Inc., Brooklyn, Nassau, Suffolk and other persons to cease using, selling, handling, transporting, or otherwise dealing in the products of Supply, and to cease doing business with Supply, or where an object thereof is to force or require persons doing business with Brooklyn, Nassau and Suffolk to cease using, selling, handling, transporting, and otherwise dealing in the products of Brooklyn, Nassau and Suffolk and to cease doing business with Brooklyn, Nassau and Suffolk."

Dated: January 6, 1971

/s/ ALBA B. MARTIN
Trial Examiner

[Issued 4/5/71]

D—4989
Long Island, N.Y.

Decision and Order

On December 15, 1970, Trial Examiner Alba B. Martin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's De-

cision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision, and the Charging Parties filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the answering brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Local 810, Steel, Metal, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., April 5, 1971.

Edward B. Miller, *Chairman*
John H. Fanning, *Member*
Gerald A. Brown, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

[Issued 4/15/71] Long Island, New York

Order Correcting Decision and Order

On April 5, 1971, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding from which there is an inadvertent omission.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by substituting the following as the first two lines of the decision:

> On December 15, 1970, Trial Examiner Alba B. Martin issued his Decision in the above-entitled proceeding and, on January 8, 1971, an Erratum thereto, finding that the

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., April 15, 1971

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

[1] 189 NLRB No. 93.

[Issued 9/20/71] Long Island, N. Y.

Order Further Correcting Decision and Order

On April 5, 1971, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding and, on April 15, 1971, a correction thereto.

IT IS HEREBY ORDERED that said Decision and Order, as corrected, be, and it hereby is, further corrected as follows:

(1) Add the words "as modified herein" at the end of the tenth line on page 2.

[1] 189 NLRB No. 93.

(2) Strike the Order and substiute therefore the following Order:

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified, and hereby orders that the Respondent, Local 810, Steel, Metal, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order, as modified below:

a. Delete paragraph 1 and substitute therefor the folowing:

1. Cease and desist from engaging in, or inducing or encouraging any individual employed by Sid Harvey, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., Sid Harvey Suffolk, Inc., or any individual employed by persons doing business with Sid Harvey, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., Sid Harvey Suffolk, Inc., or any person engaged in commerce or in an industry affecting commerce, other than Sid Harvey Supply, Inc., to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services; and cease and desist from threatening, coercing, or restraining Sid Harvey, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., Sid Harvey Suffolk, Inc., or any other person engaged in commerce or in an industry affecting commerce, other than Sid Harvey Supply, Inc.; where, in either case, an object thereof is to force or require persons to cease doing business with Sid Harvey Supply, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., and Sid Harvey Suffolk, Inc.

b. Substitute the attached notice for the Trial Examiner's notice.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby further corrected.

Dated, Washington, D. C., September 20, 1971.

By direction of the Board:

JOHN C. TRUESDALE
Deputy Executive Secretary

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in, or induce or encourage any individual employed by Sid Harvey, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., Sid Harvey Suffolk, Inc., or any individual employed by persons doing business with Sid Harvey, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., Sid Harvey Suffolk, Inc., or any other person engaged in commerce or in an industry affecting commerce, other than Sid Harvey Supply, Inc., to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods articles, materials or commodities, or to perform any services; and WE WILL NOT threaten, coerce, or restrain Sid Harvey, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., Sid Harvey Suffolk, Inc., or any other person engaged in commerce or in an industry affecting commerce, other than Sid Harvey Supply, Inc.; where, in either case, an object thereof is to force or require persons to cease doing business

with Sid Harvey Supply, Inc., Sid Harvey Brooklyn Co., Inc., Sid Harvey Nassau, Inc., and Sid Harvey Suffolk, Inc.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11201, (Telephone No. 212-596-3535).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 574, 575—September Term, 1971.

(Argued March 24, 1972 Decided May 12, 1972.)

Docket Nos. 71-1951, 71-2062

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent,

and

SID HARVEY, INC. and SID HARVEY BROOKLYN CORP.,
Intervenors.

Before:

HAYS, MANSFIELD and MULLIGAN,
Circuit Judges.

Petition for enforcement of, and cross-petition to set aside, order of the National Labor Relations Board prohibiting respondent Union from engaging in a secondary boycott in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i) and (ii)(B) (1970).

Enforcement denied and cross-petition to set aside order of the Board granted.

HAYS, *Circuit Judge:*

The National Labor Relations Board filed this application for enforcement of its order directing respondent Local 810

to cease and desist from conducting a secondary boycott in violation of Section 8(b)(4)(i) and (ii) (B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i) and (ii)(B) (1970). The charging parties, Sid Harvey, Inc. and Sid Harvey Brooklyn Corp., intervened, urging that the application be granted. The Union cross-petitioned to set aside the Board's order. We deny enforcement of the Board's order and grant respondent's cross-petition to set it aside.

I. The Facts

The Trial Examiner's findings of fact were adopted by the Board and are supported by substantial evidence. These findings establish the following:

A. The Initial Dispute

An employee of Sid Harvey Supply, Inc., was discharged on February 20, 1970, and the Union went on strike after the company refused to reinstate him. The Union began picketing Supply that day, and on March 10 commenced picketing Sid Harvey, Inc. In May and June, members of the Union picketed and distributed handbills in front of stores operated by Sid Harvey Brooklyn Corp., Sid Harvey Nassau, Inc., and Sid Harvey Suffolk, Inc. The picket signs and leaflets, and the verbal exhortations of the pickets, requested the public not to buy Sid Harvey products. The pickets were successful in persuading some of the potential customers of one store operated by Nassau not to patronize that store, and also prevailed on carriers not to make deliveries to Inc. and Brooklyn. On June 11 the Union discontinued the picketing of Inc., Brooklyn, Nassau, and Suffolk after the United States District Court for the Eastern District of New York temporarily enjoined the Union from picketing the four corporations in violation of § 8(b)(4)(i) and (ii)(B).

B. Relationships Among the Sid Harvey Companies

1. *Structure and Operations*

Supply, the company which the Union struck, and the four companies the Union picketed before the issuance of the temporary injunction, are a part of a complex of interrelated corporations operating on a nationwide basis. The Sid Harvey corporations are engaged in the reconditioning, distribution, and sale of air conditioning and heating equipment to trade users. While the Sid Harvey corporations are not totally interdependent, they constitute what is essentially a vertically integrated operation, or, to use the popular term for their relationship to each other, they are engaged in a straight-line operation.

The keystone of the Sid Harvey organization is Inc., located in Valley Stream, Long Island. Inc., and Sid Harvey Midwest, Inc., located in Illinois, are engaged in the business of rebuilding and reconditioning air conditioning and heating equipment and parts for such equipment. Inc. obtains the used equipment that it rebuilds from the sales companies within the Sid Harvey group.

The equipment rebuilt by Inc. is warehoused and then distributed by Supply to the various Sid Harvey sales companies. Supply does not distribute only Inc. goods, but all of Inc.'s goods are distributed by Supply. Supply distributes only to sales companies within the Sid Harvey group.

Although the record is not entirely clear, it appears that there are approximately 20 sales companies in the Sid Harvey group, many of which, like Nassau, Brooklyn, and Suffolk, have corporate names containing the words "Sid Harvey." These sales companies receive from Inc. via Supply all the rebuilt equipment they sell. The greater part of the new equipment sold by the sales companies is obtained indirectly from the manufacturers through Supply, with the remaining portion obtained directly from manufacturers. Thus, of Nassau's sales, 40% represents sales of Inc.'s

rebuilt equipment, and 60% is of new equipment; 60% of the new equipment sold is obtained through Supply. The corresponding figures for Brooklyn are 20%, 80%, and 85-90%, and for Suffolk are 33%, 67%, and 70%.

2. *Control*

Stephen Harvey owns 100% of the voting stock of Inc., and is chairman of the board of directors, president, and treasurer. Supply is owned by fourteen Sid Harvey sales companies located in the Northeast. Stephen Harvey has voting control of nine of these sales companies, including Brooklyn and Nassau. Collectively those nine own 73% of the stock of Supply. Stephen Harvey is chairman of the board and an officer of each of these sales companies, and is chairman of the board and treasurer of Supply. Although Stephen Harvey has a commanding position in the interlocking corporate structure of the Sid Harvey group, the Trial Examiner found that he "has no actual day-to-day duties in any of these corporations except Inc."

3. *Corporate Policy and Functional Relationships*

Much of the hearing and a large part of the opinion of the Trial Examiner were devoted to an examination of policies, practices, and working conditions within the various Sid Harvey corporations. In view of the basic questions raised by suit of this nature, a good deal of what the Trial Examiner concerned himself with was of marginal relevance and dubious materiality.

The Trial Examiner found that some of Inc.'s marketing activities are conducted in the building where Supply has its offices, although the areas in which the two corporations are located "are separated by partitions and lockable doors (which are open during working hours), and the employees of each company have separate entrances and separate restrooms." The two pay rent directly to the landlord, a partnership in which Stephen Harvey "has an interest," as he

does in all the parternerships from which companies in the Sid Harvey group rent land and facilities. The two corporations located in the one building utilize a common switchboard, and Inc. pays Supply a service fee for "some minor services" such as janitorial work. All the companies in the Sid Harvey group have the same hospital, medical, group life, and automobile liability policies. Occassionally an employee of one of the companies will take a job with another Sid Harvey company. One accounting firm served all the Sid Harvey corporations and it "prepared an office manual of standard operating procedures." However the companies were not required to use the manual.

The Trial Examiner compared the working conditions at Supply and Inc. and found:

> "Although [the Union] showed a number of working conditions in common among the employees of Inc. and Supply, [including "the same system of rating jobs, the same work hours and two 10-minute rest periods, the same number of holidays, Christmas bonuses based upon length of service, the same profit-sharing program"] there were also many working conditions that were different between the two groups ... The two groups had different rules for qualification of overtime, different sick pay and disability benefits, and other benefits. Supply has no pension plan; Inc. does. Inc. has a cash attendance award. Supply does not. Inc. has a savings plan for employees; Supply does not. There are differences in the rules on "tardiness,' smoking, making telephone calls, working on Election Day, to mention a few."

More important for the question presented by this case, the Trial Examiner and the Board found that once a year "the presidents and some other top executives" of the Sid Harvey group of companies meet to discuss problems common to the companies. The Board found that at the May,

1970 meeting the strike at Supply was discussed, but "there was no proof that overall policies resulted from these meetings, particularly no overall labor policy or personnel policy."

In addition the Board found that Stephen Harvey had personally fired two presidents of two Sid Harvey companies, and that he actively oversaw and controlled the financial aspects of the Sid Harvey companies. Inc. publishes a monthly news letter, "Renews," which the Trial Examiner termed a "house organ." This house organ contains news about people in the various Sid Harvey companies as well as corporate news. Its content reveals that the personnel of the companies considered themselves to be engaged in interlocking business activities in an interrelated corporate structure.

II. The Decision of the Board

The Board, adopting the Trial Examiner's decision, stated that the question of whether the Union had violated §8(b)(4)(i) and (ii)(B) by picketing Brooklyn, Suffolk, Nassau, and Inc. turned on whether the related companies were so closely allied as not to be "other employer[s]" within the meaning of that section. The Board said:

> "On the 'ally' issue the precise question is whether the corporations were under the actual control of Stephen Harvey, as distinguished from his potential control."

The Board found

> "[u]pon all the above facts and considerations and the entire record in the case considered as a whole . . . that despite the cooperation and mutual assistance among the various corporations directly involved herein, there is not that appreciable degree of *intergration of management and day-to-day operations* between Supply, the primary employer, and the others, as to make them allies and deprive Inc., Brooklyn, Nassau, and Suffolk

of the protection of Section 8(b)(4) of the Act." (Emphasis added.)

In so holding, the Board relied heavily on the conclusion, that, despite Stephen Harvey's dominant position in the corporate structures of Inc., Supply, and the various Sid Harvey sales companies, he did not actually control the daily operations of all these companies. In addition, in considering the differences in the working conditions and benefits of Supply, Inc., and the sales companies, the Board assumed that if the management and operations of the Sid Harvey group were integrated on a day to day basis, all working conditions and benefits—such as smoking rules and disability benefits—would be the same, regardless of the function or size of the individual company.

III. Section 8(b)(4) and the Neutral Secondary Employer

The question presented for decision by the Board was whether the four secondary employers picketed by the Union were in fact the same employer within the meaning of §8 (b)(4)(i) and (ii)(B), which provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ."

The question presented in this case is whether the Board applied the correct legal test and whether it could properly conclude, on the basis of the evidence in the record that the four employers picketed by the Union were "other employer (s)" within the meaning of the Act.

Section 8(b)(4), as amended, was enacted to prevent the widening of labor dispute to entangle employers who had no concern with the original dispute. To this end Congress prohibited unions from engaging in secondary boycotts, that is "pressure tactically directed toward a netural employer in a labor dispute not his own." *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 623 (1967) (footnote omitted). The broad policy objective of this section is "the protection of *neutrals* against secondary pressure...." Id at 627 (emphasis added) "Congressional concern over the involvement of third parties in labor disputes not their own prompted § 8(b)(4)(B). This concern was focused on the 'secondary boycott,' which was conceived of as pressure brought to bear, not 'upon the employer who alone is a party [to a dispute], but upon some third party who has no concern in it' " (footnotes omitted). *N.L.R.B.* v. *Local 825, Int'l Union of Operating Engineers*, 400 U.S. 297, 302-03 (1971). The basic question in this case is whether in fact Inc., Nassau, Brooklyn, and Suffolk were neutral third parties in the dispute between respondent Union and Supply. *N.L.R.B.* v. *Local 810, Steel Fabricators*, 299 F.2d 636, 637

(2d Cir. 1962); *N.L.R.B.* v. *Milk Drivers Local 584*, 341 F.2d 29, 32-33 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

In determining whether an employer is in fact a neutral in a labor dispute, the courts have considered such factors as the extent to which a corporation is de facto under the control of another corporation, the extent of common ownership of the two employers, the integration of the business operations of the employers, and the dependence of one employer on the other employer for a substantial portion of its business. See, e.g., *Carpet Layers Local 419* v. *N.L.R.B.*, 429 F.2d 747, 752 (D.C. Cir. 1970); *N.L.R.B.* v. *General Teamsters Local 126*, 435 F.3d 288, 291 (7th Cir. 1970); *Truck Drivers Local 728* v. *Empire State Express, Inc.*, 293 F.2d 414, 423 (5th Cir.), *cert. denied*, 368 U.S. 931 (1961); *N.L.R.B.* v. *Somerset Classics, Inc.*, 193 F.2d 613, 615 (2d Cir.), *cert. denied*, 344 U.S. 816 (1952).

As the court said in *Vulcan Materials Co.* v. *United Steelworkers of America*, 430 F.2d 446, 451, 543 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

> "In the final analysis, however, the question of neutrality cannot be answered by the application of a set of verbal formulae. Rather, the issue can be resolved only by considering on a case-by-case basis the factual relationship which the secondary employer bears to the primary employer up against the intent of the Congress as expressed in the Act to protect employers who are 'wholly unconcerned' and not involved in the labor dispute between the primary employer and the union.
>
> • • •
>
> In determining whether the relationship of a secondary employer and a primary employer is such as to destroy neutrality, the court must look to the *essence* of the relationship, and not to its incidental trappings."

See also *Local 24, Int'l Bhd. of Teamsters* v. *N.L.R.B.*, 266 F.2d 675, 680 (D.C. Cir. 1959). The Supreme Court

has cautioned against the mechanical application of tests which obscures the "central theme"—neutrality—of this section. *Nat'l Woodwork Mfrs. Ass'n* v. *N.L.R.B., supra,* at 625. See also *Local 761, Electrical Workers* v. *N.L.R.B.,* 366 U.S. 667, 677 (1961). Cf. *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675 (1951).

Neutrality, for purposes of the Act, is not a technical concept. To determine whether an employer is neutral involves a common sense evaluation of the relationship between the two employers who are being picketed. In mechanically applying a "day-to-day" test in this case, the Board engaged in a technical exercise in the intricacies of corporate structure rather than a realistic, common sense evaluation of neutrality.

The Sid Harvey organization is essentially an integrated complex which manufactures, distributes, and sells a limited number of products. Ownership and control of the five corporations is centralized or overlapping. The daily contact among the corporations is extensive, and the operation and success of each is interrelated with and heavily dependent upon the other members of the group performing their assigned tasks. Only in the most strained and technical sense could the picketed employers be characterized as neutral.

The petition for enforcement is denied, and the cross petition for an order vacating the order of the Board is granted.

MANSFIELD, *Circuit Judge* (Concurring):

While I agree with the majority's view, as expressed in Judge Hays' able opinion, that as a matter of law the union did not violate the secondary boycott provisions of the National Labor Relations Act, § 8(b)(4)(i), (ii)(B), I feel that a more detailed explanation of my reasons is required.

Ever since the addition of the secondary boycott provisions to the NLRA, the separation of primary and thus

protected concerted activity from secondary and hence unprotected concerted activity has led to great difficulty, in part because of the absence of legislative guidelines. As Justice Harlan, speaking for the Supreme Court, recently noted:

> "No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of 'secondary' conduct; it has drawn no lines more arbitrary, tenuous, and shifting than those separating 'primary' from 'secondary' activities."

Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386-87 (1969). Nevertheless, boundary lines between "primary" and "secondary" activity have been drawn. It is clear, for example, that "allies" of a struck employer are not neutrals and are therefore not entitled to the protections of the secondary boycott provisions. An ally relationship may arise either from affirmative action—such as the performance of "struck work" by the secondary employer for the primary—or from the combination of circumstances. As the majority opinion notes, some of the circumstances which have been considered as persuasive in the past are the degree of common ownership of the employers involved, common control over their day-to-day operations and labor relations policies, and the extent of integration of business operations.

In my view the Board's error lay not merely in the mechanical application of the "day-to-day" test but also in its failure to give sufficient weight to other circumstances which are controlling in this case. The absence of one of the foregoing relevant circumstances (e.g., lack of exercise of "day-to-day" control) does not automati-

cally entitle the "other" employer to gain a secondary or neutral status. Other circumstances may be sufficiently strong by themselves to call for denial of the claim of neutrality. Where there exists a high degree of common ownership and a large amount of economic interdependence between two or more companies, they should not be considered separate for the purpose of the secondary boycott provisions. In such instances the policies of the Act are best served by allowing the employees of one employer to extend their concerted activity to the situs of the other. "Any other rule would permit the employer to divide and conquer by doing business through several corporations, each comprising one bargaining unit." Levin, *"Wholly Unconcerned": The Scope and Meaning of the Ally Doctrine Under Section 8(b)(4) of the NLRA*, 119 U. Pa. L. Rev. 283, 320 (1970). On the other hand where there is common ownership only, such as exists in the typical conglomerate, without any substantial economic integration or interdependence, the pressure or absence of actual common control over operations or labor relations policies could be of great significance. See, e.g., *Los Angeles Newspaper Guild Local 69* v. *NLRB*, 443 F.2d 1173 (9th Cir. 1971), *enforcing* 185 N.L.R.B. No. 25 (1970); *Miami Newspaper Pressmen's Local 46* v. *NLRB*, 322 F.2d 405, 409 (D.C. Cir. 1963); *Employing Lithographers of Greater Miami* v. *NLRB*, 301 F.2d 20, 29 (5th Cir. 1962); *Television & Radio Artists* v. *NLRB*, — F.2d — (D.C. Cir. April 17, 1972).

Applying the foregoing principles, I am convinced that Sid Harvey, Inc., Sid Harvey Brooklyn, Sid Harvey Suffolk, and Sid Harvey Nassau do not qualify for the statutory protection offered to "other employers." As the majority opinion indicates, by reason of Stephen Harvey's controlling stock interest, the degree of his domination and control of the several corporations, though only potential, was overwhelming. In addition, each company was fundamentally dependent on the others for its economic well-

being. *All* of Inc.'s products are warehoused and distributed by Supply to the other Harvey companies. Although supply purchases equipment from outside sources, it sells and distributes only to the Sid Harvey sales outlets. Furthermore, almost all of the products sold by Brooklyn, Nassau, and Suffolk are furnished by Supply. The picture, therefore, is of a manufacturing arm, a distribution arm, and several localized sales arms, each doing the bulk of its business with the others. In addition, there was evidence of an integrated advertising policy, a common telephone directory listing, periodic intercompany meetings, a common Sid Harvey newsletter, and other indicia of a coordinated enterprise. Under such circumstances I do not believe that the union was required to prove a greater degree of actual control by Stephen Harvey over the operations of the complex. In short, while neither the common ownership nor the extensive economic interdependence, standing alone, might be sufficient to establish an ally relationship, their combination in this case convinces me that the various Harvey corporations are not neutral or "wholly unconcerned".

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of May, one thousand nine hundred and seventy-two.

Present:

HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondent,*

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP., *Intervenor.*

A petition for enforcement of an order of the National Labor Relations Board and a cross-petition to set aside said order,

This cause came on to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel,

On consideration thereof, it is now hereby ordered, adjudged and decreed that enforcement of the said order of said Board be and it hereby is denied and that the cross-petition to set aside the said order of the said Board be and it hereby is granted in accordance with the opinion of this court with costs to be taxed against the petitioner and intervenors.

s/ A. DANIEL FUSARO
Clerk

APPENDIX D

Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees—
>
> * * *
>
> *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *.

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Supreme Court, U.S.
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OCT 20 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP., *Petitioners,*

vs.

LOCAL 810, METALS, ALLOYS, HARDWARE FABRICATORS AND WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Respondents.*

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI*

INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of the United States of America (hereafter the "Chamber") files this brief *amicus curiae* to present its views upon a case of great importance in the administration of the National Labor Re-

*This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

lations Act.[1] The question raised in this case—whether *potential*, as opposed to *active*, common control is sufficient to destroy the Act's secondary boycott protections—is a matter of vital concern to the Chamber.

The decision of the Court of Appeals in this case significantly dilutes the secondary boycott safeguards afforded by Section 8(b)(4) of the Act. *First*, the court below not only rejected the active common management criterion of neutrality that heretofore has been utilized by the National Labor Relations Board and other courts of appeals, but, in lieu thereof, resurrected a congressionally discarded and unworkable "unity of interest" doctrine. *Second*, the ramifications of this new and unwarranted approach are far-reaching. A vast array of businesses, like the employers here, depend upon a variety of integrated business relationships to effectively compete. The result of sanctioning union pressures against related divisions or subsidiaries of a corporation, or even its outside suppliers or customers with whom it has substantial dealings, will inevitably be a failure to shield "unoffending employers and others from pressures in controversies not their own." *N. L. R. B.* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 692 (1951). *Finally*, the decision below represents the most recent in a series of opinions severely circumscribing the neutrality concept of *Denver Building Trades* allegedly predicated upon this Court's decision in *National Woodwork Manufacturers' Ass'n.* v. *N. L. R. B.*, 386 U. S. 612 (1967). The time is now ripe for a needed reconciliation of *Denver Building Trades* and *National Woodwork*. This case is a uniquely appropriate vehicle for that purpose.

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1. The Chamber is a business federation with a membership of over 3700 state and local chambers of commerce and trade associations, and an underlying membership of more than five million individual business men and business firms. It is the largest association of business and professional organizations in the United States.

As a principal spokesman for the American business community, the Chamber believes that its views and experience may be of assistance to the Court. It is for this reason that the Chamber respectfully submits this brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT.

1. Prior to the instant case, the Board and courts uniformly required that "actual common control of labor policies," not merely the potential control implicit in common ownership or economic interdependence, was required before two employers could be deemed a single enterprise for secondary boycott purposes.[2] Any broader rule would fail to achieve the dual congressional objectives—to "confine labor conflicts to the employer in whose labor relations the conflict has arisen, and to wall off the pressures generated by that conflict from unallied employers." *Miami Newspaper Pressmen's Local No. 46* v. *N. L. R. B.*, 322 F. 2d 405, 410 (D. C. Cir. 1963).

The decision below substitutes for a criterion of active common management[3] an unpredictable "common sense"

2. *J. G. Roy & Sons Co.* v. *N. L. R. B.*, 251 F. 2d 771, 773 (1st Cir. 1958). See also *Los Angeles Newspaper Guild* v. *N. L. R. B.*, 443 F. 2d 1173 (9th Cir. 1971), *cert. den.* 404 U. S. 1018 (1972); *Television and Radio Artists* v. *N. L. R. B.*, 462 F. 2d 887 (D. C. Cir. 1972); *Backman Machine Company* v. *N. L. R. B.*, 266 F. 2d 599 (8th Cir. 1959); *Sheet Metal Workers Local 233* v. *Atlas Sheet Metal Co.*, 384 F. 2d 101 (5th Cir. 1967); *Teamsters Local 639 (Poole's Warehousing, Inc.)*, 158 NLRB 1281.

3. If the Court of Appeals here had applied an active common management test, the result below would have been different. In this case, the picketed secondary employers ("Inc." and the three sales companies) exercised no actual control over the labor policies of the primary employer ("Supply Company"). The Board's finding that "each corporate president" of the separate corporations "was in sole charge of," and "actually conduct[ed] the day-to-day management of the corporation's business, includ-

analysis of the "relationship between the two employers who are being picketed." App. B, p. 37a. Under this approach, the Court of Appeals, whenever there exists *either* "centralized or overlapping" ownership *or* significant "economic interdependence" between two employers, would treat the concerns as a single employer for secondary boycott purposes. This view of the law, in addition to differing markedly from that followed by the Board and other courts, is a revival of the common law "unity of interest" doctrine which Congress rejected when it enacted Section 8(b)(4). Indeed, that Section was specifically added to the Act in 1947 to "reverse [the] trend" in which parties who were found "to possess a 'unity of interest' with the disputing employer" were embroiled in labor disputes in which they were "not immediately involved."[4]

2. The decision below also cannot be reconciled with *Denver Building Trades*. That case involved the question of whether a general contractor and his subcontractors on the same construction project should be treated as a single unified enterprise for secondary boycott purposes based on the close functional integration and economic interdependence inherent in their relationship. This Court resolved that issue by finding such factors insufficient to defeat the parties' separate neutrality status or to "make the employees of one the employees of the other." 341 U. S. at 690. Such "business relationships" are, as this Court

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ing its relations with its sources of supplies, its customers, its management of its personnel, and its labor relations", was not disturbed by the Court of Appeals. App. A. p. 7a; App. B. p. 34a. In fact, the picketed secondary companies were not involved in any respect in the decision to discharge the Supply Company supervisor —the incident which gave rise to the picketing. App. A, p. 3.

4. II Legislative History of the Labor-Management Relations Act, 1947, at 1047-1048 (Comments of Senator Murphy). See also *id.* at 1106 (Comments of Senator Taft) and *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, ... F. 2d ....., 80 LRRM 3254, 3256-7 (D. C. Cir. 1972).

observed, "too well established . . . to be overrridden without clear language doing so." *Id.* at 690. The *Denver Building Trades* rule—that functional integration is insufficient to involve separate employing entities in the disputes of the other—has subsequently been applied to a variety of interrelated[5] business relationships of both a horizontal[6] and vertical ("straight line") nature.[7]

The critical inquiry in each case, as well as in those instances involving the related "ally"[8] or "co-employer"[9] concepts, has been consistent: that a labor union should be entitled to bring pressure on only those persons who, in addition to the offending employer, actually determine their conditions of employment. Mere potential control has not, prior to the present case, been sufficient to extend the area of industrial conflict.

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5. See, e.g., *Haughton* v. *Woodworkers Local 5-40*, 294 F. 2d 766, 767 (9th Cir. 1961) and *Milk Drivers Local 584 (Old Dutch Farms, Inc.)* 146 N. L. R. B. 509 (1964), *enf'd.* 341 F. 2d 29 (2nd Cir. 1965).

6. See, e.g., *Teamsters' Local 639 (Poole's Warehousing, Inc.)*, and *Los Angeles Newspaper Guild* v. *N. L. R. B.*, *supra* n. 2.

7. See, e.g., *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, *supra* n. 4.

8. The "ally" doctrine applies where one employer agrees to perform "struck work" for the primary employer. Since the result of such activity is the same as if the primary employer had hired strikebreakers, the employer performing such work, in effect, stands in the shoes of the primary employer and is considered to be "firmly allied" in the primary's dispute. See, e.g., *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672, (S. D. N. Y. 1948) and *N. L. R. B.* v. *Business Machine Mechanics Local 459*, 228 F. 2d 553 (2nd Cir. 1955), *cert. den.* 351 U. S. 962 (1956).

9. The "co-employer" doctrine applies where two or more corporate entities have commonly controlled labor relations policies. Again, since the ostensibly neutral employer actually has control over the involved employees' working conditions, he is, in effect, an adjunct of the primary employer. See, e.g., *Truck Drivers Local 726* v. *Empire State Express, Inc.*, 293 F. 2d 414, 423 (5th Cir. 1961) and *Truck Drivers Local 107 (Sterling Wire Products Co.)*, 137 NLRB 1330 (1962).

3. The instant case is part of a recent effort to revive the concept of "economic realism." This trend, arising in a multiplicity of contexts,[10] has caused a severe dislocation in our national labor policy. Overlapping ownership[11] and substantial business dealings between interrelated com-

10. See, e.g., *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, 429 F. 2d 747 (D. C. Cir. 1970), a case relied on by the decision below and subsequently revised (*Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B., supra* n. 4), where the court remanded for the Board's consideration the neutrality status of an alleged secondary retailer in light of its "economic interest" in the outcome of a dispute involving employees of its independent, functionally integrated installers; and *Local 742, Carpenters* v. *N. L. R. B.*, 444 F. 2d 895 (D. C. Cir. 1971), *cert. den.* 404 U. S. 985 (1972), where the court's remand to the Board contained instructions to henceforth consider a boycotted employer, notwithstanding his lack of control over the union's underlying grievance, as an unprotected primary where he retains an "economic interest" in the subject of the dispute.

11. The consolidation of both related and unrelated business enterprises through mergers or acquisitions has undoubtedly had a greater impact in shaping our present-day modern industrial structure than any other single factor. See J. Blair, Economic Concentration (Harcourt Brace Jovanovich 1972) at 257 *et seq.* Impelled by large scale marketing factors, including the need for increased product diversification and sources of supply, the trend towards greater consolidation has increased markedly in the past decade. *Id.*, at 275 *et seq.* See also, Federal Trade Commission Stat. Rep. No. 9, Large Mergers in Manufacturing and Mining 1948-1971, May 1972, at 7-23. For example, the explosive emergence of the corporate conglomerate, where the aquiring company usually has very little in common with the acquired companies, has resulted in a ten-fold increase in the number of mergers from that extant in 1950. See Burck, *The Merger Movement Runs High*, Fortune (Feb., 1969), 79.

panies[12] and independent concerns[13] are commonplace in American industry. The decision in this case threatens to radically alter the secondary boycott protection afforded employers in each of these situations as well as analogous areas.[14] The instant case, in sum, does not represent a unique phenomena. The question presented is one which,

12. Common ownership of both horizontally and vertically integrated companies is characteristic of major segments of our economy including the steel, lumber, textile and retail food industries. Blair, *supra* n. 11, at 31 and 270 *et seq.* The history of mass production is replete with examples of concerns whose economic survival was dependent upon their ability to vertically integrate, backwards or forwards. Federal Trade Commission, Report on Corporate Mergers and Acquisitions, May, 1955, at 116, *et seq.* For example, a significant segment of the lumber industry consists of large paper manufacturers who are integrated backwards into logging and lumbering and, in some cases, forward into retailing or distribution. Blair, *supra* n. 11, at 271. These "captive" sources of supply or distribution represent major capital enterprises whose day-to-day operations and labor policies are independently established and administered free from the control of their parent corporation. *Ibid.*

13. Although the lower court's opinion occurred in the context of commonly owned entities, its "economic interdependence" rationale would apparently extend to business dealings between separately owned but closely related independent contractors which deal exclusively or primarily with a single business. A prime example is the burgeoning franchise industry where independent business concerns serve as the distributive or sales arm of existing manufacturing or retail concerns. See Vaughn, Franchising Today, (Farnsworth Publishing Co., Inc., 1969).

14. The "interest" between interrelated or functionally integrated concerns in each employer's labor disputes is often no different than that which exists between unionized employers in a horizontally organized industry (e.g., the trucking industry) where a union's success at one company will inevitably be followed by parallel demands on others. Similarly, a primary's customers or competitors will never be "wholly unconcerned" in the primary's labor disputes because of their direct economic stake in its outcome. See Borus & Warshal, *Neutrality and Secondary Boycotts: An Economic Evaluation of a Legal Question,* 17 Lab. L. J. 310 (1966). The courts have not, of course, removed the Act's secondary boycott protections in such relationships. See, e.g., *N. L. R. B.* v. *Carpenters Dist. Council,* 184 F. 2d 60 (10th Cir. 1950) *cert. den.* 341 U. S. 947 (1951).

as the petition correctly notes, is likely to recur in every case in which commonly owned companies perform complimentary functions.

4. The present case also represents an improper and far-reaching extension of *National Woodwork*. In that case, a five to four majority of this Court legitimatized a product boycott directed solely at an employing entity which actually controlled the assignment of the disputed work. The crux of the decision was the offending employer's statutory bargaining duty *vis-a-vis* his own employees; the "vortex . . . of the labor dispute" embraced a contractual restriction precluding the employer from subcontracting work traditionally performed by his employees which did not extend "to satisfy union objectives elsewhere." 386 U. S. at 627, 644. Cf. *Fibreboard Paper Prods. Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964); *Teamsters' Union* v. *Oliver*, 358 U. S. 283 (1959).

A neutrality test of active common management comports with *National Woodwork* by confining union pressure to the employer who actually controls the labor policies giving rise to the dispute. The decision below, on the other hand, extends the "vortex" of the dispute to entities elsewhere who have no contractual relationship with the involved employees and who did not make the offending managerial decision. The effect is to severely restrict management's contractual freedom. Such a result, coupled with the other significant ramifications of the instant case noted above, warrants review by this Court.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth by the Petitioner, the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP., PETITIONERS

v.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In furtherance of a labor dispute with Sid Harvey Supply (Supply), Local 810 (the Union) picketed the premises of Sid Harvey, Inc. (Inc.) and Sid Harvey Brooklyn, Suffolk, and Nassau (Pet. App. 17a, 22a-23a). The Board held that the Union had engaged in secondary picketing in violation of Section

8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B), because "despite the cooperation and mutual assistance among the various corporations * * *, there is not that appreciable degree of integration of management and day-to-day operations between Supply, the primary employer, and the others, as to make them allies and deprive Inc., Brooklyn, Nassau and Suffolk of the protection of Section 8(b)(4) of the Act" (Pet. App. 14a).[1] The Board entered an appropriate remedial order (Pet. App. 18a-19a, 23a).

The court of appeals declined to enforce the Board's order, finding that the "Sid Harvey organization is essentially an integrated complex which manufactures, distributes, and sells a limited number of products,"

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[1] Inc., which is wholly owned by Stephen Harvey, is engaged in the business of rebuilding and reconditioning parts and equipment used in heating and air conditioning systems (Pet. App. 6a). Supply, the stock of which is owned by 14 Sid Harvey sales companies, including the three here (Brooklyn, Nassau, and Suffolk), warehouses and distributes all of Inc's rebuilt products, as well as new parts purchased from major manufacturers. Supply's only customers are the Sid Harvey sales companies. The bulk of the products sold by the sales companies is obtained from Supply. (Pet. App. 6a-8a.) Stephen Harvey owns all of the voting stock of Inc. and a majority of the voting stock of 9 of the 14 sales companies (including Brooklyn and Nassau), which own Supply. He is Chairman of the Board and an officer of each of these sales companies and of Supply. (Pet. App. 8a.) However, he is not involved in the day-to-day management or labor relations of any of the companies, other than Inc., and his authority is limited to hiring and firing the top executives of the companies. The top executives manage each company and handle its personnel and labor relations problems. (Pet. App. 6a-7a, 13a.)

that "[o]wnership and control of the five corporations is centralized or overlapping," and the "daily contact among the corporations is extensive," and that "the operation and success of each is interrelated with and heavily dependent upon the other members of the group performing their assigned tasks." The court concluded that, in these circumstances, the picketed companies could not be characterized as "neutral" for purposes of Section 8(b)(4) of the Act. (Pet. App. 37a).

2. While the Board believes that the court of appeals should have enforced its order, it did not petition for certiorari because, in its view, the Board and the court essentially differed only in their evaluation of the facts of this particular case. Petitioners (Sid Harvey, Inc. and Sid Harvey Brooklyn), the charging parties before the Board, contend that a difference in legal principle is involved because, "in the absence of common active control over labor management policies, the fact that commonly owned companies are functionally integrated" does not warrant "a finding that they constitute a 'single employer' for purposes of Section 8(b)(4)" (Pet. 2). The Board has held, however, that where employers "are engaged in an integrated, straight line operation"—as the court below viewed the situation here—they cannot be considered separate entities for purposes of that Section even though "their managers have complete authority in determining labor policies and running day-to-day operations." *Local No. 235, Lithographers (Henry Wurst, Inc.)*, 187 NLRB No.

63, 76 LRRM 1083, 1085; see also *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 87 NLRB 54, 56.

In addition, the Board disagrees with petitioners (Pet. 5-8), that there is a conflict among the courts of appeals. In *J. G. Roy & Sons Co.* v. *National Labor Relations Board*, 251 F. 2d 771, 773 (C.A. 1), the court distinguished the situation there from one where the "secondary employer's operations were an absolutely essential and integral part of the primary employer's enterprise." In *Bachman Machine Co.* v. *National Labor Relations Board*, 266 F. 2d 599 (C.A. 8), each company was "engaged in a different, separate and nonintegrated business" (*id.* at 602), and the court noted that a different problem would be presented "if the two companies were engaged in an integrated operation, as in the Irwin-Lyons Lumber Company case * * *" (*id.* at 605). In *Sheet Metal Workers Local 223* v. *Atlas Sheet Metal Co.*, 384 F. 2d 101, 105 (C.A. 5), the two corporations made different products, had only one customer in common, and their business dealings with each other were minimal. And *Los Angeles Newspaper Guild* v. *National Labor Relations Board*, 443 F. 2d 1173 (C.A. 9), and *Television and Radio Artists* v. *National Labor Relations Board*, 80 LRRM 2001 (C.A. D.C.), involved autonomous units of corporate conglomerates, rather than "vertically integrated operations" (Pet. 7; and see Pet. App. 39a).

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP.,
Petitioners,

v.

LOCAL 810, STEEL, METALS, ALLOYS & HARDWARE FABRICATORS & WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 28a-40a) is reported at 460 F.2d 1. The decision and order of the National Labor Relations Board (Pet. App. 1a-27a) are reported at 189 NLRB No. 93.

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[1] The abbreviation "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1972 (Pet. App., p. 41a). By order dated August 4, 1972, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including October 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the relationship between the struck employer and other related companies, all of whom were part of a centrally controlled and interdependent business enterprise, warranted the holding by the court below that the related companies were not "neutrals" in the employer's dispute with the picketing union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at page 42a of the appendix to the petition.

STATEMENT

On February 20, 1970, Local 810, Steel, Metals, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (herein referred to as the "Union") protested the discharge by Sid Harvey Supply, Inc. (herein referred to as "Supply") of one of the Union's supporters. When the president of Supply refused to reinstate the employee, the Union instituted picketing not only at Supply, but at four other corporate members of the Sid Harvey business complex; Sid Harvey, Inc. (herein referred

to as "Inc."), Sid Harvey Suffolk, Inc. (herein referred to as "Suffolk"), Sid Harvey Nassau, Inc. (herein referred to as "Nassau"), and Sid Harvey Brooklyn (herein referred to as "Brooklyn"). It was undisputed that Stephen Harvey, who was the president of Inc., controlled the stock ownership of all five of the involved companies, was a corporate officer of each, and had the authority to order the reinstatement of the discharged employee. (A.[2] 272-273, 244-245, 389-390).

The Sid Harvey complex is a group of companies engaged in the common enterprise of the manufacturing, distributing and retail selling of rebuilt parts for heating systems. Inc. manufactures the products at its plant in Valley Stream, New York; Supply distributes these parts from its warehouse eight miles away to the twenty (20) Sid Harvey retail sales companies across the United States. Although the Sid Harvey sales companies market products of other manufacturers, some of which they obtain directly from the manufacturers, they receive Sid Harvey products only from Supply, and Supply sells only to the Sid Harvey sales companies. Supply also distributes to the sales companies some of the products made by other manufacturers. Characteristically, each of the sales companies involved here operate two to three stores and employ nine to eleven employees.

There is a significant degree of active centralized control as well as overlapping management within the Sid Harvey complex. As the dominant stockholder, officer and director, Stephen Harvey actively controls

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[2] The abbreviation "A." refers to Appendix printed for the court below.

the appointments and tenure of the corporate officers and the financial aspects of all companies in the chain. The Sid Harvey enterprise is directed from Inc.'s offices in Valley Stream where several officials of Inc. exercise active supervision and coordination of various phases of the activities of the sales companies and of Supply. Both at an annual meeting of the executives in the Sid Harvey system, and on a daily basis the officers of the various companies coordinate activities and give each other mutual assistance. The court below summarized the relationship between the Sid Harvey companies as follows (Pet. App. 37a):

> "The Sid Harvey organization is essentially an integrated complex which manufactures, distributes, and sells a limited number of products. Ownership and control of the five corporations is centralized or overlapping. The daily contact among the corporations is extensive, and the operation and success of each is interrelated with and heavily dependent upon the other members of the group performing their assigned tasks."

The extent of daily cooperation among the Sid Harvey companies was exemplified by the reaction to the picketing at Supply. For example, on the instructions of an officer of Supply, the President of Suffolk, one of the sales companies, accepted deliveries diverted from Supply on several occasions during the strike (A. 259-262, 268-273, 254-255). Moreover, as is apparent, each of the Sid Harvey companies had a vital interest in the labor dispute at Supply, which might disrupt the distribution of Sid Harvey products.

In the proceedings below, petitioners filed charges with the National Labor Relations Board (herein referred to as "the Board"). Initially the Board's Regional Director dismissed the charges on the grounds

that Supply and Inc. were "allied companies in that both are commonly owned and controlled and are both engaged 'in a straight-line operation.' " (A. 538-539). Thereafter, the Regional Director was reversed and a complaint issued. The Board adopted without discussion the view of the Trial Examiner that the Sid Harvey companies were neutrals in the dispute with Supply because there was not a sufficient degree of "integration of management and day to day operations". It therefore held that by picketing the other Sid Harvey companies the Union had engaged in an unlawful secondary boycott (Pet. App., pp. 1a-27a).

Upon review of the Trial Examiner's decision as affirmed by the Board, the court of appeals found that the Board's reliance on the absence of day-to-day control over the subsidiary companies was too myopic and mechanical as a test for determining the issue of neutrality. It held that the Board erred in ignoring the economic interdependence of the companies, the dominance of Stephen Harvey's control, and the centralized control and overlapping management that existed with respect to the companies involved. Accordingly, the three judge panel denied enforcement of the Board's order and granted respondent's petition to vacate the order. No petition for rehearing *en banc* was filed either by the petitioner or by the Board. Neither did the Board petition this Court for certiorari.

ARGUMENT

The decision of the court below is correct and does not conflict with the decision of any other court of appeals.

1. The court below followed the well recognized principle that in determining the claimed neutrality of any employer in a labor dispute, the court must examine

the "essence of the relationship" with the primary disputant, "and not its incidental trappings." *Vulcan Materials Co.* v. *United Steelworkers of America,* 430 F.2d 446, 543 (5th Cir. 1970), cert. den., 401 U.S. 963 (1971). Accord: *Carpet Layers Local 419* v. *N.L.R.B.,* No. 71-1320, D. C. Cir., decided July 28, 1972, sl. op. at pp. 8-9, 80 LRRM 3254 at 3257 and cases cited. (Pet. App. 36a). The courts of appeals repeatedly have held that relevant to this inquiry are such factors as common ownership, common control through domination of one employer by another, overlapping of managment functions, operational integration, and the interdependence of the companies on each other for their economic well being. *Vulcan Materials Co.* v. *United Steelworkers of America, supra; Truck Drivers & Helpers Local Union No. 728* v. *Empire State Express,* 293 F.2d 414 (5th Cir. 1961), cert. den., 368 U.S. 931; *Local No. 24, International Brotherhood of Teamsters* v. *N.L.R.B.,* 266 F.2d 675 (D. C. Cir. 1959); *Carpet Layers Local 419* v. *N.L.R.B.,* 429 F.2d 747, 752 (D. C. Cir. 1970); *Carpet Layers Local 419* v. *N.L.R.B.,* No. 71-1320, D. C. Cir., decided July 28, 1972, 80 LRRM 3254, (petition of the Board enforced upon review following remand); *N.L.R.B.* v. *General Teamsters Local 126,* 435 F.2d 288, 291 (7th Cir. 1970).

In applying the foregoing principles, the court below determined that the closely coordinated and interdependent operations of the Sid Harvey companies, together with the additional foregoing factors, reflected a significant degree of active centralized control by Stephen Harvey and by the hierarchy of intercorporate executives. Also, the court found of particular relevance that the Sid Harvey organization was a vertically integrated system in which the component companies were dependent upon each other for their

mutual economic success, a factor long recognized as significant in determining the lack of neutrality. *Truck Drivers & Helpers, Local Union No. 728* v. *Empire State Express, supra; National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Company)*, 87 NLRB 54 (1949); See, *Bachman Machine Company* v. *N.L.R.B.*, 266 F.2d 599, 605 (8th Cir. 1959). Moreover, in declining to accord controlling weight to the Board's "day-to-day" operational control test, the court was following this Court's admonition against mechanical reliance upon verbal formulae at the expense of sound legal analysis. *National Woodwork Mfrg. Ass'n.* v. *N.L.R.B.*, 386 U.S. 612, 625 (1967); See also, *Local 761, Electrical Workers* v. *N.L.R.B.*, 366 U.S. 667, 677 (1961). In short, the court relied upon established principles in finding that the Sid Harvey companies were not the "wholly unconcerned" and uninvolved employers which Congress sought to protect.[3]

2. In proposing a "common management" test as the touchstone for determining who are neutral employers (Pet. pp. 6-9), the petitioner finds support

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[3] *Vulcan Materials Co.* v. *United Steel Workers of America, supra*, 430 F.2d at 451. The remarks of Senator Taft concerning the scope of the Act's secondary boycott provisions are apt:

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees . . ." 93 Cong. Rec. 4198.
>
> * * *
>
> "The secondary boycott ban is merely intended to prevent a union from injuring a third person, who is *not involved in any way in the dispute* or strike . . . It is not intended to apply to a case where the third person is, in effect, in cahoots with or *acting as part of the primary employer.*" (Emphasis supplied.) 93 Cong. Rec. 8709.

neither in the cases it has cited nor in reason. Although assuredly the courts in the cited cases looked to common management or the lack of it as a factor, none have ever suggested that it is, or ought to be, the sole consideration. See e.g., *J. G. Roy & Sons* v. *N.L.R.B.*, 251 F.2d 771, 774 (1st Cir. 1958); *Bachman Machine Co.* v. *N.L.R.B.*, 266 F.2d 599, 605 (8th Cir. 1959). In both of the foregoing cases the court mentioned the absence of integrated operations as an additional consideration in determining the neutrality of commonly owned companies. (In accord are the cases cited in section 1 above.) Exclusive reliance on such a factor would be a reversion to primative formalism. For, in many instances a manager or managerial group lacks the authority to direct the most significant affairs of the business or has only partial control thereof. Indeed, as in this case, active control over significant aspects of the business may lie with the executive hierarchy of a parent corporation. Accordingly, there is no warrant for the Court to consider for a review a doctrine which is without merit and which is so plainly at odds with the established law.

3. Contrary to the contention of the petitioner (Pet. pp. 7-8), the decision below in no way conflicts with *Television & Radio Artists* v. *N.L.R.B.*, 80 LRRM 2001 (D.C. Cir. 1971) or *Los Angeles Newspaper Guild* v. *N.L.R.B.*, 443 F.2d 1173 (9th Cir. 1971) enf'cing. *per curiam*, 185 NLRB No. 25. Both of those cases concerned separate autonomous divisions of the Hearst Corporation, a conglomerate composed of numerous divisions engaged in diverse enterprises ranging from television broadcasting to newspaper publication to cattle ranching. In both cases, the court found that each of the autonomous divisions involved were sepa-

rately controlled as if they were independent businesses, establishing their own policies and in one case even competing with each other. Looking to the substance of the relationships, rather than the legalistic form, in each case the court held that even though part of the same corporation, the separate divisions were so divorced from each other as to be neutrals in the labor disputes of the others. Nothing in the facts, the holding or the opinion below undermines either of these decisions.

4. Moreover, because the decision below turned on its peculiar facts involving a conjunction of interdependent operations and significant centralized control, it has none of the far reaching significance for conglomerates that the Chamber of Commerce suggests in its *amicus curiae* brief (p. 6, n. 11).

5. Finally, there exists no inconsistency between the decision below and *Denver Building and Trades Council*[4] as the Chamber contends. There was no hint here, that the neutrality of any party would have been impaired had the court been dealing with the kind of arms-length independent contractors whose relationship was at issue in that case. Rather, the very factors considered to be critical by the court below, such as common ownership, active centralized control, and economic interdependence (as opposed to the contractual interrelations of the construction contractors in *Denver Trades*) demonstrates the fidelity of the court to the principles announced in *Denver Trades* and other decisions of this Court.

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[4] *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP.,

Petitioners,

vs.

LOCAL 810, METALS, ALLOYS, HARDWARE FABRICATORS AND WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,

Respondents.

REPLY BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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The Chamber previously filed a brief *amicus curiae*[1] in the instant case in support of the Petitioner[2] to present its views to the Court on the major question of labor law here presented: whether actual common control, as opposed to the potential control inherent in common ownership or economic integration, is required to defeat the Act's

1. The brief was filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

2. The petition was filed with this Court on October 9, 1972.

neutrality protections. In their briefs in opposition to the petition, the Board and Respondent present arguments which, the Chamber believes, attempt to obscure this fundamental issue based upon a misconception of the significance and import of the lower court's ruling. Accordingly, a further presentation of the Chamber's views is warranted.

1. Contrary to the assertions made by the Board and the Respondent (Bd. Br., p. 3; Resp. Br., p. 9), the lower court's refusal to accept the Board's neutrality finding[3] was grounded upon its fundamental disagreement with the "day-to-day" common management test utilized in assessing whether the picketed employers in the instant case were properly treated as "'other employers' within the meaning of the Act". App. B, p. 35a. It was the Board's alleged failure to apply "the correct legal test" (App. B, p. 35a), and not any disagreement concerning an "evaluation of the facts of this particular case" (Bd. Br., p. 3), which sharply differentiates the court's position from the Board's. Board Counsel's effort here to reconcile the court's blanket rejection of its active common management test on a factual basis or, alternatively, upon an alleged retrospective retraction of that test to "integrated, straight-line operations" (Bd. Br. at p. 3),[4] advanced for

3. The Board concluded "that despite the cooperation and mutual assistance among the various corporations . . ., there is not that appreciable integration of management and day-to-day operations between . . . the primary employer, and the others, to make them allies" and deprive them of the statutory protection. (App. 14a.)

4. The Board's *Henry Wurst, Inc.*, decision (187 NLRB No. 63; 76 LRRM 1083) does not, as its counsel now asserts for the first time, evidence a retreat from the common active management principle. Bd. Br. at p. 3. In that case, unlike the instant one, the *Wurst* operations were all conducted under one roof (within "separate sections of a single U-shaped building") and *common management control* was, in fact, *exercised* through the joint scheduling of production operations "to insure a smooth flow of

the first time in arguments addressed to this Court,[5] amounts to an improper "post-hoc rationalization for agency action" which "the courts may not accept. . . ." See, *N. L. R. B.* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 444 (1965).

2. As the Respondent correctly acknowledges in its brief, the core question here involved is whether the " 'day-to-day' operational control" test is inconsistent with the "central [neutrality] scheme" underlying this Court's *National Woodwork* opinion.[6] Resp. Br., at p. 7. Under the lower court's view, *National Woodwork*[7] compels re-

work." 76 LRRM 1083, at 1084. These critical factual distinctions undoubtedly account for the failure of any party, including the court below, to cite or even discuss the *Wurst* in the instant case. Counsel's "post-hoc" effort to equate the Sid Harvey operations—consisting of four companies in the New York Metropolitan Area and "twenty-five more corporations all over the United States, from Maine to Wisconsin" with those of *Wurst*, so as to allow the Union having a dispute "with Sid Harvey of Reading (Pennsylvania) . . . to picket with impunity at the premises of Sid Harvey Central Supply, Inc. in Lombard, Illinois", would "far from effectuating the policies of the Act, manifestly do them violence." Bd. Br. in Court of Appeals, at p. 22.

5. The Board's brief to the court below uniformly urged the necessity for applying the "standard enunciated by the courts in *Roy and Bachman*" (citations omitted)—that "in order to establish that two corporations are a single employer with respect to Section 8(b)(4), there must be common ownership *and* active, not merely potential common control." Bd. Br. to Ct. of Appeals, at p. 21 n. 12.

6. National Woodwork Mfg. Assoc. v. N. L. R. B., 386 U. S. 612 (1967).

7. As noted in the Chamber's previous brief (pp. 6-8), the instant case is one of a series of recent decisions extending the "vortex" rationale of *National Woodwork* to defeat the neutrality of employers who neither created nor actively controlled the disputed employment conditions. It is this severe dislocation of the traditional neutrality concept, predicated upon *National Woodwork*, which the instant case represents that warrants this Court's attention.

jection of the traditional common management control standard[8] and requires, instead, a "common sense" assessment of the economic "relationship between the . . . employers being picketed." App. B. p. 37a. Where those relationships reveal "centralized or overlapping ownership" or that "the operations and success of each is interrelated with and heavily dependent upon the others . . . ," they automatically become "economic allies" under the court's approach. This result obtains even though, as in the present case, the picketed secondary employers do not employ the disputing employees or exercise control over their employment conditions.

It is this revived concept of "economic realism"[9] which

8. The essential conflict between the court of appeals' decisions discussed in Petitioner's brief (Pet. Br. at pp. 5-8) and the decision below is not factual, as the opposition briefs assert, but a basic doctrinal conflict concerning the requisite standards for assessing neutrality between commonly owned and interrelated employers. These decisions, unlike the instant one, uniformly require a showing of "actual common control over labor policies", as distinct from potential control, before separate employers can be treated as allied for secondary boycott purposes. See *J. G. Roy & Sons* v. *N. L. R. B.*, 251 F. 2d 771, 773 (1st Cir. 1958), and cases discussed in the Petition at pp. 7-8.

9. Although the instant case arises in the context of commonly owned concerns, the paramount underlying issue of whether potential, as distinct from actual control, removes the separate neutrality status of business entities is a recurring one which continues to create considerable disagreement between the Board and the courts. For example, the "economic realism" test was first enunciated in *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, 429 F. 2d 747 (D. C. Cir. 1970) (relied upon by the decision below) in which the court initially argued that a retailer's potential control over its outside contractors' labor policies, based on the close functional integration and economic interdependence revealed in their business relationships, disqualified the retailer from the Act's neutrality protections. On further reflection, however, the court significantly revised its views consistent with the Board's decision on remand. *Carpet, Linoleum Layers Union No. 419* v. *N. L. R. B.*, ... F. 2d ..... 80 LRRM 3254 (D. C. Cir. 1972). In its revised opinion, the court eschewed its former "economic and policy considerations analysis" as being inconsistent with *N. L. R. B.* v. *Denver Building and Construction Trades*

underlies the decision and others,[10] and the consequent geometrical increase in the effect of strikes flowing from this concept, which vitally concerns the Chamber and warrants this Court's review.[11] Moreover, since the economic

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Council, 341 U. S. 675 (1951), and the legislative history of the Act and held the "economic interdependence [even though of a vertical, straight-line nature]" between the retailer and his contractors to be insufficient to destroy the Act's neutrality protections. The court's revised approach is wholly inconsistent with the economic and policy analysis adopted by the court below here.

10. See, e.g., *Local 742, Carpenters* v. *N. L. R. B.*, 444 F. 2d 895 (D. C. Cir. 1971), cert. den. 404 U. S. 986 (1972) involving the related "right to control" test protecting business entities in disputes which they have neither created nor control. As in the instant case, the court severely criticized the Board test as being inconsistent with *National Woodwork* and adopted, in its place, a standard which removes neutrality protections for employers having an "economic interest" in the disputed employment conditions. See similarly, *Local 636, United Association* v. *N. L. R. B.*, 430 F. 2d 906 (D. C. Cir. 1970); *American Boiler Manufacturers Assn.* v. *N. L. R. B.*, 404 F. 2d 556, 560 (8th Cir. 1968).

11. The preservation of the neutrality concept against the continued erosion exhibited by this and similar rulings (See, n. 10 and 11, supra), is a matter of continuing concern to the Chamber's membership. Thus, the Chamber recently participated in another case as *amicus curiae* in urging this Court to further explicate its *National Woodwork* holding in light of continuing eroding effect of that doctrine upon the entire secondary boycott area. See, Chamber's Br. in *J. L. Simmons Company, Inc.* v. *United Brotherhood of Carpenters and Joiners of America, et al.* (No. 71-357, Oct. Term, 1971). Significantly, two Justices of this Court voted to grant certiorari (Mr. Justice Brennan and Mr. Justice White) even though the Board opposed the Petitioner's request based upon its desire to reexamine its "right to control" test in light of the court's remand. 30 L. Ed. 2d 371. Thereafter, the Board invited the Chamber, along with a broad spectrum of other interested groups, to present its views to the Board sitting *en banc*. Although arguments were completed a number of months ago, the Board has not yet issued its decision. The Board's difficulties in resolving this issue reflect the continuing uncertainty regarding the controlling neutrality standards which the courts' decisions here and elsewhere have engendered since *National Woodwork*. This confusion will continue absent clarification by this Court.

realism standard attributed to *National Woodwork* by the court below and others severely undermines the traditional neutrality concepts of this Court's *Denver Building Trades* and *Burns and Roe*[12] decisions, the time is now ripe for a needed reconciliation of these decisions.

3. Moreover, even if the court's refusal to accept the Board's critical findings was predicated solely upon a differing "evaluation of the facts of this particular case", it was plainly not warranted in substituting its views for those of the Board in these circumstances. Such *de novo* judicial rejection of the Board's findings would violate this Court's stricture compelling acceptance of the Board's factual determinations where supported by substantial evidence in the record as a whole. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 488 (1951). Additionally, assuming the Board's neutrality finding "was not a purely factual question, but involved the application of law to facts", the reviewing court was not at liberty to "displace the Board's choice between two fairly conflicting views, even though the court . . . (could) justifiably have made a different choice had the matter been before it *de novo.*" 340 U. S. at 488; See also *N. L. R. B.* v. *United Insurance Company*, 390 U. S. 254, 260 (1968).

The "least that can be said for the Board's decision" in the instant case "is that it made a choice between two fairly conflicting views, and under these circumstances, the Court of Appeals should have enforced its order." *United Insurance*, 390 U. S., at 260. "[A]s the agency established by Congress and entrusted with the major task of

12. *N. L. R. B.* v. *Local 825, Operating Engineers*, 400 U. S. 297 (1971), in which this Court reaffirmed its intention to protect employers having close business ties from a "disruption of business relationships" even where the Union's intent is to cause only a "partial", as opposed to a total, cessation of those relationships. 400 U. S. at 304-305.

interpreting and applying the Act,[13] it was the Board's function, not the court's, to "make the required determination" of the applicable standard for evaluating employer neutrality and its application to the facts "in a particular case." *Carpet Layers, Local 419* v. *N. L. R. B.*, ____ F. 2d ____, 80 LRRM 3254 at 3259; *N. L. R. B.* v. *Denver Building Trades Council*, 341 U. S. 675 at 691-692 (1951). Since the active common management test, as applied by the Board in this case, conforms with the dual Congressional objective of confining the labor conflict "to the employer in whose labor relations the conflict has arisen while shielding all others from the pressures generated by that conflict",[14] the lower court exceeded its powers in rejecting the Board's ultimate findings.

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13. See, e.g., *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 800 (1945):

> "one of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration."

14. See *Miami Newspaper Pressman's Local No. 46* v. *N. L. R. B.*, 322 F. 2d 405 at 410 (D. C. Cir. 1963) and Chamber's previous Br. at pp. 3-4.

CONCLUSION.

For the foregoing additional reasons, as well as the reasons previously set forth by the Chamber and the Petitioner, the petition for writ of certiorari should be granted.

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